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MAKING *ROMER* WORK

TODD M. HUGHES*

In *Romer v. Evans*,¹ the Supreme Court issued what is undeniably its most positive and progressive decision addressing gay and lesbian rights. The Court struck down an amendment to the Colorado constitution which not only repealed all state and local laws and regulations providing for protection of gays and lesbians from various sorts of discrimination but also prohibited any state or local government from reenacting any anti-discrimination law unless the state constitution was amended. The Supreme Court found Colorado Amendment 2 unconstitutional because it denied gays and lesbians the equal protection of the laws.

This Article will discuss not only how *Romer* affects the parochial interests of gays and lesbians; it will also partially address certain issues in *Romer* that must be faced in order for it to fulfill its potential as an important case for gay and lesbian rights. This Article will also discuss how *Romer* can be read as opening up a new possibility for equal protection law that does away with the artificial and dated construct of three tiers of scrutiny depending upon the class of individual affected; and how *Romer* could usher in a new era for a more candid and honest application of the equal protection clause for constitutional law as a whole, and not just in the area of gay and lesbian rights. The author hopes what is written here raises some questions about both the place of gays and lesbians in the larger progressive agenda and the ways in which the law in general and *Romer* in particular can be used as tools in the struggle for legal and social equality.

LEGAL IDENTITY

Before turning to the larger question of how *Romer* changes equal protection law, the Article will address the more fundamental idea of legal identity and how our characterization of an individual's or group's legal identity in legal practice and scholarship can play an important role in the way equal protection law is applied. For purposes of this Article, legal identity is defined simply as the ways in which an individual or group is described for purposes of legal discourse. For example, how the group of gay and lesbian military service members are described; what propensities, characteristics and rights they have and how that legal description of identity—as a matter of litigation strategy—ultimately impacts the larger legal

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1. 116 S. Ct. 1620 (1996).

and social discourse in which gays and lesbians are perceived. Legal identity is distinguishable from personal or political identity in the sense that practitioners and scholars have a greater role in choosing what types of legal descriptions or arguments to present and what not to present in order to win the case or make the arguments successful.²

The Article will start with the question of how *Romer* articulates gay and lesbian legal identity and how legal identity as a structure can be used to articulate and create an identity with the right to full and equal participation in the legal as well as cultural and political realms of this country. Put another way, it will interrogate the ways in which "legal" identity can be deployed to make a place for us in the "social." How we construct our legal identities affects the way in which our social identities are constructed, perceived, and maintained by society at large.³

Although this discussion of legal identity is rooted in *Romer*, a full discussion of how gay and lesbian legal identity has been portrayed by and in the Supreme Court would be obviously incomplete without mention of the Court's decision in *Bowers v. Hardwick*.⁴ Although the holding of *Hardwick* is familiar, there are a few key points that need to be set forth. First, the Court consistently used the term "homosexual" rather than gay or lesbian. Although given the time period of this case, such a practice might not seem abnormal, it is an important distinction. Naming is an important activity and whether the Court chooses to use the generally more positive gay and lesbian rather than the colder "homosexual" speaks volumes about the Court's understanding of gay and lesbian identity. Also, the Court is very careful to equate "homosexual activity" *solely* with "sodomy" even though it is known that given the various legal definitions of sodomy such one-to-one correspondence was not accurate.⁵ And even more significantly, the Court filled the category or identity of "homosexual" as a person exclusively with the content of "sodomy." Finally, the Court further limited the legal and even social

2. In posing such a relatively simple definition of legal identity, I do not mean to suggest that "identity" is such a simple subject. Indeed, the question of identity and, specifically, gay/lesbian/bisexual/queer identity(ies) is extremely complicated and convoluted. See generally MARJORIE GARBER, *VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE* (1995); MONIQUE WITTIG, *THE STRAIGHT MIND AND OTHER ESSAYS* (1992); EVE KOSFOSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990). Moreover, the connections between identity and the disciplinary practices by which society is ordered, *i.e.*, legal practice, is equally complicated. See Janet Halley, *The Construction of Heterosexuality*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* 82 (Michael Warner ed., 1993).

3. In discussing a "construction" of legal identity, I want to make clear that while I firmly believe identity is constructed (as opposed to essential) I do not mean to suggest that we can choose our sexual identities to any great extent. Identity is determined and overdetermined by a large number of factors, some of which we control, most of which we do not. What I mean simply is that through a discursive structuring of our legal identity, we can to an extent, influence the ways in which our social identities exist.

4. 478 U.S. 186 (1986).

5. See Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 70 VA. L. REV. 1721 (1993).

identity of gays and lesbians when Justice White wrote for the majority that “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . .”⁶ Hence, in *Hardwick*, the legal identity of gays and lesbians, at least as articulated by the Court’s opinion, included nothing but the ability to commit sodomy and eliminated any identity with family or community. In other words, by filling the content of the identity only with one act, the Court effectively eliminated all others. By linking identity with a sexual activity, the Court dehumanized and depersonalized gay men and lesbians by removing all other aspects of personal and social identity.

Romer, on the other hand, presents a far more positive view of gay and lesbian legal identity. Beyond the fact that the outcome was favorable, the rhetoric of the opinion also displays a far greater respect and understanding of gay and lesbian legal identity and the protections anti-discrimination laws are intended to provide. For instance, at one point the Court noted that it found “nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”⁷ The rhetoric of this passage is surprisingly inclusive and supportive. First, it clearly rebuffs the arguments always pressed by proponents of anti-gay initiatives that they are only opposing “special rights.” Indeed, the Court seems to recognize that our social structure is not a level playing field and that the protections sought by gays and lesbians (as well as other “minority groups”) are not special at all, but simply remedial and necessary to achieve equality. In addition, the Court’s reference to “ordinary civic life” implies a legitimacy, both legal and social, for gays and lesbians as individuals that has never been articulated so strongly before.

However, in one sentence of the opinion, *Romer* creates the biggest challenge we face in establishing a progressive and positive legal identity for gay men and lesbians. Specifically, Justice Kennedy wrote, attempting to distinguish a case relied upon by Justice Scalia in dissent, that “[t]o the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable.”⁸ In other words, the Court held that whether a person can be legally classified and identified based upon his or her criminal conduct was not at issue in *Romer*. Thus, for the Court, what was at issue was the “status” of the people in question, rather than any conduct. In distinguishing this case, Justice Kennedy and the Court performed what this author would describe as the

6. 478 U.S. 186, 191.

7. 116 S. Ct. at 1627.

8. 116 S. Ct. 1620, 1628 (*discussing Davis v. Beason*, 133 U.S. 333 (1890)).

ultimate act of repression, an act of repression which we must undo if *Romer* is to have any use in the future.

What *Romer* repressed of course, in that single sentence, was the specter of *Hardwick* and the very real fact that homosexual sodomy still can be punished as a crime. Hence, whether a group of persons can be classified or defined based upon criminal conduct is implicated by the Court's decision even if the majority chose not to address it. To make criminal conduct a factor, one has to connect gay and lesbian identity, at least in part, with the conduct that qualifies as sodomy. Although I wouldn't go as far as *Hardwick* and make sodomy synonymous with gay identity, at the same time, to erase the fact of sexual conduct completely from identity is as equally disturbing as *Hardwick's* complete reliance on it. To the extent criminal or possible criminal conduct can (not to say should) be used as a basis for discriminatory classification, that question is implicated by *Romer*.

Romer's erasure of *Hardwick* isn't a novel idea—Justice Scalia makes this point in dissent⁹—but the Court's refusal to face *Hardwick* says as much about how the *Romer* majority views gay and lesbian legal identity as did the *Hardwick* majority opinion. In other words, just as *Hardwick* improperly equated gay and lesbian legal identity solely with the act of sodomy, *Romer* equally, and equally improperly, removed the category of sodomy from the equation. In *Hardwick* we are only the sex we have, while in *Romer* we don't appear to have sex at all. Both of these formulations of legal, and consequently, social and cultural identity are wrong and until the Court gets it right, we will have a difficult time convincing the Court to apply the lessons of *Romer* to other more controversial issues such as gay and lesbian marriage, adoption and parenting.

In beginning to (re)construct a gay and lesbian legal identity, we must transform the sexless identity of *Romer* and the sex-only identity of *Hardwick* into a legal identity that includes the full range of individual identity accorded heterosexuals. We must build on the *Romer* Court's recognition of our right to participate in an "ordinary civic life" in a "free society," while at the same time, collapsing the distinction drawn by the *Hardwick* Court among family, marriage, or procreation and homosexual activity. Homosexual activity, sodomy, gay and lesbian sex is just as much a part of family and marriage as is heterosexual sex. And likewise, just as heterosexual relationships are not exclusively defined by the sex they have, neither are gay and lesbian relationships.

In short, a reconstruction of gay and lesbian legal identity requires returning conduct to our identity and facing up to *Hardwick*. Although some legal activists have achieved beneficial short-term results by repressing *Hardwick* and hiding behind the empty notion of sexual orientation as a "status" without conduct, most noticeably in a handful of the military cases, we cannot afford to rely upon a notion of legal identity that allows so little

9. 116 S. Ct. at 1629.

content to our lives.¹⁰ Moreover, if we adhere to this artificial status/conduct distinction, any protections we win based upon the equal protection clause will be equally artificial as they will be based upon a false notion of our legal identity. Put more strongly, an equal protection gained only for status is not equal at all; it simply protects a name—homosexual, gay, lesbian—without protecting any content the life attached to that name may have.

And before turning to my next point, let me just suggest one example of how the question of legal identity and how it is structured can be practically put to use. The mandatory discharge of gays and lesbians from the military is well known. Yesterday, however, broadcasted over National Public Radio was the story that the military was considering discharging the first female pilot cleared for combat duty—on charges of adultery.¹¹ This demonstrates, at least to me, that the military is applying a different type of standard to not only gays and lesbians when it comes to private conduct but to women as well. For it is patently obvious to me, that a fair amount of the straight men in the military commit both sodomy, as defined by some states at least, and adultery, but are nevertheless retained. Thus, in facing the gays in the military issue, we might consider recharacterizing the legal identities involved as not simply homosexuals, but as all people to whom the sexual misconduct laws are unequally applied.

TRANSFORMING EQUAL PROTECTION LAW: ROMER'S LEGACY

If on the more specific level, *Romer* repressed the decision in *Hardwick* and thereby the specter of sodomy, *Romer*, on the more general level, also represses or conveniently forgets the traditional application of equal protection law and the large degree of deference it gives to legal classifications in the absence of a suspect class.

In this abbreviated Article there is neither the time nor is it necessary to do an extended analysis of the roots of strict scrutiny in equal protection. It suffices to say that "strict scrutiny" review arose from the famous Footnote 4 in *Carolene Products*¹² and that historically it has meant that when

10. Moreover, this success seems very limited and short-term. For instance, in *Steffan v. Perry*, 8 F.3d 57 (D.C. Cir. 1994), a three-judge panel of the United States Court of Appeals for the D.C. Circuit held a Department of Defense Directive equating the "status" of homosexuality with a propensity to commit homosexual acts was unconstitutional. This decision, however, was vacated and the case was reheard by the full court, sitting *en banc*, which upheld the directive and declined to adopt the status/conduct distinction urged by the plaintiff. *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994).

11. Since the date of the conference, this incident has received considerable attention in the news media. Major stories have appeared in *The Washington Post* and *The New York Times*, as well as a segment on 60 Minutes. For discussions on this story, see Elaine Sciolino, *Accused B-52 Pilot Considers Her Options, Including Resignation*, N.Y. TIMES, May 16, 1997, at A22; John Ritter & Steven Kamarow, *Search for Solutions to Mixed-Sex Problems*, USA TODAY, May 7, 1997, at A4.

12. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

classifications are based upon a person's race, the courts must perform a detailed judicial inquiry to determine whether a person's right to equal protection of the laws has been infringed. Accompanying this strict level of scrutiny have been two other levels of scrutiny: the first, a very low level of scrutiny when no suspect class such as race is involved, which has traditionally required the courts to find any rational basis for the government action whether intended or not for the action to be sustained; and second, a level somewhere in between that has been applied in cases involving gender classifications.

Although arguments are consistently made that gay and lesbian people constitute a suspect class and classifications affecting us should therefore be subject to some heightened level of scrutiny, this approach has not been generally accepted in the lower courts. This is especially true at the appellate level, and the Supreme Court has certainly not found that gays and lesbians constitute a suspect classification.¹³ We can, of course, keep making the suspect class argument, but given the current make-up of the Supreme Court, there is not much optimism about its success. Therefore, the best way to pursue a gay civil rights agenda is to re-fashion the traditional rational basis test along lines that are at least suggested by *Romer* if not specifically required. Moreover, in doing that we may demonstrate that strict scrutiny is an artificial and outdated form of judicial review, a part of the traditional liberal view of the law, that, for the most part, no longer serves any useful purpose and should be discarded.

The necessity for applying strict scrutiny is usually phrased in the most serious of tones: *i.e.* "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny."¹⁴ This strong language may once have been necessary in a time when governmental actors practiced overt racial discrimination, and indeed when many judges themselves strongly believed in racial segregation. Hence, strict scrutiny was a useful tool by which to constrain legislative bodies and the judiciary from making decisions that denied a group, which historically was regarded as a suspect class, equal protection.

Today, however, there are different types of constraints against overt and obvious racial discrimination, *i.e.*, social and cultural constraints, such that the legal constraints imposed by the enhanced levels of scrutiny for certain classes of race and gender are no longer useful in the ways they once were

13. This argument in some ways relates to the question of whether gay and lesbian identity constitutes an immutable characteristic. Any extended analysis would require more time and space than is available here. Let me say, simply, that I believe sexual identity as a category is constructed, like all other categories of knowledge; hence, I find nothing "immutable" about it. This conclusion, however, should not lead to the conclusion that sexual orientation is not entitled to equal protection as it is, nevertheless, a category or group of people, however unstable and difficult to define, that is discriminated against.

14. *Korematsu v. United States*, 323 U.S. 214, 216 (1944), *quoted in Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

and simply serve as shorthand ways in which to reach a result. In other words, rather than looking closely at the purpose of the legislation or governmental action, courts spend more time debating whether the action qualifies as a suspect class. Once that decision is made, the ultimate outcome is almost foregone and whether the purpose of the legislation was nevertheless legitimate is brushed aside. In the modern post-*Brown* legal era, classifications involving suspect classes are inevitably overturned.

All of this focus on which tier is appropriate is an evasive and ultimately harmful way of purporting to do a reasoned equal protection analysis. By devoting most of our energy to deciding whether a certain class is so discriminated against or has the necessary immutable characteristics that it qualifies as a suspect class, we fall into a trap. If we win the suspect class argument, we win the case; but if we don't, we lose because we have so reinforced the traditional duality of traditional equal protection law, i.e., the historical pattern where almost all governmental action is legitimate under a rational basis test and almost none is under strict scrutiny.

Romer defies this traditional understanding of equal protection law. Instead of debating the intricacies of whether gays and lesbians are a suspect class (which presents a myriad of problems incapable of being addressed here, not least of which is what constitutes the class), *Romer* presumes that rational basis review is appropriate. But then the Court proceeds to perform a rational basis review which does not stop once any old half-reasonable justification is put forward, as certainly should have happened under traditional rational basis review. Previously, the Supreme Court has stated that rational basis review is satisfied if "there is any reasonably conceivable state of facts" that would provide a rational basis for the government's conduct.¹⁵ There were any number of reasons for the legislation put forward by Colorado—associational freedoms, free choice in housing decisions, the public's morals, conserving resources to fight discrimination against suspect classes, most of which on their face would have passed the traditional and extremely deferential rational basis test. *Romer* demanded not only some rational basis but that the basis bear a "rational relation to some legitimate end."¹⁶

It is this application, and specifically the focus on a "legitimate end" which shows promise for a different type of equal protection analysis, a new life for rational basis review and obviates the need for the artificial three-tier system of equal protection analysis. By requiring that courts scrutinize not only the classification, but whether the classification has a "legitimate end,"

15. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993), *quoted in* *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996).

16. *Romer*, 116 S. Ct. 1620, 1627 (1996).

Romer has put some teeth into rational basis review.¹⁷ In applying this heightened rational basis standard, perhaps, more appropriately called "legitimacy review," the Court found no legitimate purpose of the statute, but rather, concluded that Colorado Amendment 2 was an illegitimate "classification of persons undertaken for its own sake,"¹⁸ and based upon mere animosity.

One could say this "heightened" rational basis is simply intermediate or strict scrutiny all over again, but there is an important distinction. When heightened scrutiny has been traditionally applied, it has been on the basis of the class involved. Heightened rational basis, however, has little to do with the class, but rather, with the reasons for the class. In this sense, heightened scrutiny erases tiers by requiring a close look at the rational basis in all cases, regardless of the class of individuals involved.

This type of rational basis analysis, which scrutinizes the purpose of the statute or governmental action, bears great promise in cases dealing with gay and lesbian issues and certain other types of cases involving other groups, which may or may not be considered suspect or quasi-suspect classes. First, let me talk briefly about utilizing *Romer* to argue for a heightened rational basis review in gay and lesbian cases. The most obvious benefit of such an approach is that we do not have to convince the courts to declare gays and lesbians a suspect class. Although we have on occasion been able to convince a few federal district courts that suspect class analysis is appropriate, for the most part the courts of appeals have roundly rejected such an approach.

The second benefit follows from the first: By foregoing the question of a suspect class, we can also to a large extent avoid the very problematic debate concerning the boundaries and borders of what constitutes the class of gays and lesbians. The fact that this Article has avoided the term *bisexual* throughout is indicative of the problem we face in this area. This Article has not discussed the question of bisexuality not because it is irrelevant to the larger theoretical debate, but because it raises an entirely new set of questions that are relevant but which complicate the application of equal protection law.¹⁹ Avoidance of any detailed scrutiny of the gay and lesbian class membership is important because in at least one instance, a court of appeals, in rejecting a lower court's finding of a quasi-suspect class, went further and opined that homosexuals did not really constitute an identifiable class at all.²⁰ These are not battles that need to be fought and won at this point in time, since it is highly unlikely that anyone pressing an equal

17. The phrase "rational basis with teeth" or some variation has been used by various commentators to describe a heightened rational basis review performed by the Supreme Court in cases such as *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). See generally GERALD GUNTHER, *CONSTITUTIONAL LAW* (1991).

18. *Romer*, 116 S. Ct. at 1629.

19. See GARBER, *supra* at note 2.

20. *Equality Foundation v. Cincinnati*, 54 F.3d 261 (6th Cir. 1995).

protection claim based upon his or her status as a gay man or lesbian will do so when he or she is not gay in order to obtain some advantage.

The final and perhaps most important benefit of using a heightened rational basis test and paying close attention to the purposes of the statute is that we can focus attention on what the government's action is trying to do to us based upon our sexual orientation. We then may determine whether any actual legitimate reason exists, and not just as previously applied if "any reasonably conceivable state of facts" exists that would support a rational basis. Application of this new test will not necessarily be easier or even more successful. For instance, in the marriage and military cases, some courts and even the Supreme Court may easily find an actual legitimate purpose (or at least a legitimate purpose sufficient for the court) to distinguish between gays and lesbians and non-gays and non-lesbians. But heightened rational basis frees us from the cumbersome and outdated three tier structure and allows us to devote our energy to explaining why the supposedly rational reasons expressed by the other side are not really rational at all, just as the Court found in *Romer*.

CONCLUSION

In conclusion, this Article will end by turning outward from my specific focus on equal protection law in the context of gay and lesbian rights to a broader view to look at how *Romer* could transform other areas of equal protection doctrine as well. In broaching this topic, my discussion is going to be brief—first, because my knowledge is limited, and second, because what I want to say is more in the way of a suggestion and an invitation for further discussion than any definitive argument that strict scrutiny should be thrown out altogether, although it may be the logical extension of the position I have just taken.

As noted above, the historical necessity for the strict scrutiny as envisioned in *Carolene Products* may have passed. And its continued existence has had far more negative consequences than positive ones, especially with the makeup of the federal bench during the '80s and '90s. Moreover, beyond the simple change in the makeup of the bench, there are going to be far greater difficulties in applying a strict scrutiny approach in what is increasingly becoming our multiracial, multiethnic society. For instance, what do you do when a statute neutral upon its face works to the benefit of African-Americans, Hispanics and Whites, but burdens Asian-Americans? Is it a violation of equal protection law because it burdens a suspect class, or is it not a violation of equal protection law because it is a neutral statute and, although it burdens one suspect class, it does not burden others so that it presumably was not intended to deprive any group of equal protection. Rather than looking at which suspect class it burdens, we could and should look behind the class and specifically at the reasons for the governmental action.

Such an application could have benefits in several areas of the law in which the conservative majority of the Court has used suspect class review to strike down progressive and necessary distinctions between genders and races—specifically, *Adarand*²¹ and the government set-asides for minority and women contractors which have been fairly successful in bringing contractors who were competitively disadvantaged by structural discrimination into the government contract business. Also, we might use a heightened rational basis in affirmative action cases in schools, like the *Hopwood*²² case, where it is often necessary to apply differing types of criteria to admissions to achieve a racially and ethnically balanced class. Likewise, in the recent line of voting rights cases, the Court has seemed to almost reflexively strike down minority districts because of their racial markings despite the fact that these districts sent some of the first minority legislators to Congress from their respective areas.²³

By moving beyond the judicially created three tier level of scrutiny for equal protection cases, we can force the courts, the legislatures, and society to take a careful look at problems involving minority groups in our country. While the three tiers may have once been a useful tool, it is a blunt tool that hinders as much as it harms in our current legal and social environment. By requiring the courts to examine more closely the legislative ends and reasons underlying group classification, without relying so much upon the class itself, we have a more flexible and subtle legal tool to promote equal protection in the law and in society.

21. *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

22. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1995).

23. *See, e.g., Shaw v. Hunt*, 116 S. Ct. 1894 (1996).